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The United States Supreme Court's decision in *Reynolds v. Sims*[1] and in the accompanying cases has left no doubt about the Court's basic philosophy in apportionment problems: "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as all races."[2] In implementation of this principle, the Court has determined that both houses of a bicameral legislature must be apportioned according to population, there must be periodic reapportionment, the boundaries of political units such as counties may be respected unless the consequence is serious population inequalities, and popular votes in support of an inequitable apportionment may be judicially ignored because a minority of voters has as much right to equal protection of the laws as a majority does.[3]

In its decisions the Supreme Court has been concerned entirely with achieving as much equality in the population of districts as is practicable. Although the Court has spoken about districts of equal population, it has implicitly assumed that if a district elects two legislators, it should have twice the population of a district electing one legislator. Underlying the Court's thinking, and implicit in the judicial slogan "one man, one vote," seems to be the belief that each legislator ought to represent or "stand for" an equal number of voters. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[4]

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1 377 U.S. 533 (1964).

2 *Id.* at 568.

3 *Id.* at 576-84. Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 737 (1964).

4 Reynolds v. Sims, 377 U.S. 533, 568 (1964).

The right of a person to equal protection of the laws is an *individual* right, and the Court has defined the question of apportionment in terms of the weight accorded to an individual's vote. But the legislative process is not so simple, nor is the relationship between legislator and constituent so direct. Legislators are, in practice, responsive to group pressures, and the legislative output is a result of coalitions of minority interests. Most state legislatures are organized primarily along partisan lines, and in some states the majority legislative party votes on many issues with sufficient cohesion to achieve most of its aims.[5] One of the major consequences of reapportionment in many states will be to change the balance of partisan power in the legislature. Although the Supreme Court has defined the apportionment issue in terms of individual rights, its decisions and those of lower courts are filled with facts and judgments about the underrepresentation of a class of voters—those living in metropolitan counties.

In a sense the legislator serves as a representative of all the persons in his district, but there is evidence to show that legislators are often more responsive to the demands of the majority of voters who voted for them than to those of the minority who did not. When there are conflicting viewpoints and interests in a constituency, a legislator need not—and can not—satisfy all. Veteran legislators, in particular, know which groups in the constituency provide the necessary votes for re-election, and they are likely to cater to the demands of these groups.[6]

DISTRICTING AND WASTED VOTES

A consequence of these legislative realities is that the voter who chooses a winner has greater weight in the legislature than one who chooses a loser. Although it is possible that a close vote in a district may make a legislator more sensitive to minority viewpoints, it is substantially correct to say that a vote for a losing legislative candidate is a *wasted vote*. In two-party elections the nature of the districts will determine how many votes are wasted by each party. Only under some form of pro-

[5] Jewell, The State Legislature 48-62 (1962).
[6] Miller, *Majority Rule and the Representative System* (Unpublished paper, presented at the 1962 annual meeting of the American Political Science Association, Washington, D.C.)

portional representation does neither party waste a substantial number of votes, and the Illinois House is the only state legislature using such a system. Under a single-member district system, the minority party usually wastes more votes than the majority party. If partisan strength were evenly distributed across a state, the minority party would theoretically win no elections in single-member districts and would waste all of its votes. In practice, partisan strength is unevenly distributed, but the minority party usually gets a smaller percentage of legislative seats than its proportion of the vote. It is not always recognized that multi-member districts (in the absence of proportional representation) give the majority party an even greater advantage and waste more minority votes. The larger the size and number of multi-member districts, the more pockets of minority strength are swallowed up and the larger number of voters there are in the minority party who are unrepresented by a man of their choice. In 18 of the state senates and 38 of the lower houses some use is made of multi-member districts.

The use of districts results inevitably in the wasting of votes and almost always handicaps the minority party. But it is possible for the majority party to maximize the wasting of minority votes by a skillful drawing of district boundaries. This is the pracice known as gerrymandering. The boundaries may be drawn so that minority party strength is spread thinly among a number of districts, or if the minority is too strong to make that feasible, its voting strength may be concentrated to produce lopsided majorities in one of a few districts and to insure majority control of the remainder. Either practice achieves the same goal.[7] An equally or more effective way to waste minority votes is for the majority party to enact a districting law that makes use of at-large districts, at least in multi-member counties where the majority party is strong.

Although the effects of any districting pattern on a partisan minority are more obvious and more measurable, districting has similar effects on other minorities. When a district is formed that includes a populous county and a sparsely populated one, or an urban majority and a suburban minority, or a large number of white voters and a smaller number of Negroes, the minority

[7] Hacker, Congressional Districting 46-62 (1963).

group in that district has less chance than the majority to select a legislator who is responsive to its interests. Members of any minority group, like supporters of a minority party, are likely to be disadvantaged by any method of districting; but it is also possible that a majority in the legislature will draw district boundaries with the deliberate purpose of minimizing the representation of one or more minority groups. Gerrymandering may be used against groups as well as against a party, though the effects are not exactly the same. In any district where it constitutes a minority, a party's votes are wasted; but a group or interest *may* be able to exercise influence over a legislator or even hold the balance of power in his selection though it has less than a majority position in a given district.

IS THERE A RIGHT TO AN EFFECTIVE VOTE?

The issue that will eventually be faced by the Supreme Court is whether a person's right to vote for legislators is unconstitutionally impaired by a districting pattern that makes his vote ineffective by minimizing his chance of electing the legislator whom he prefers. In apportionment cases the courts are concerned with the rights of individuals, not counties, parties, or interest groups. But the *practical effect* of an apportionment not based on population can be measured only in terms of the reduced representation of urban or metropolitan counties in the legislature. Likewise, the practical effect of a districting pattern can be measured only in terms of the underrepresentation of Republican voters or Negro voters, for example, as a class. No representative system could assure the representation of every interest, however small, and only proportional representation avoids wasting a substantial percentage of votes. It is extremely unlikely that any court would consider imposing on the legislatures a system so completely foreign to American state legislative experience.

The Supreme Court is not likely to impose any single type of district on the legislatures. The only question likely to receive serious judicial consideration is whether some patterns of districting dilute the effectiveness of a substantial minority so severely, and perhaps so deliberately, as to constitute "invidious discrimination"—the standard used by Justice Douglas in the

Baker case.[8] The minority that draws judicial attention might be a partisan one, because the partisan effects of districting are both clear and significant. The minority might be a racial one, because the Court—ever since the *Gomillion* case[9]—has been sensitive to the effect of districting on the Negro voter. The issue of minority representation has been present in several cases in the lower courts and in a few that have come within the purview of the Supreme Court. But the issue has yet to be presented before any court in all its complexity. The problems of representing both partisan and Negro minorities will be examined in this article with respect to: 1) drawing boundaries for single-member districts, and 2) determining whether to use multi-member districts. In each case we shall be concerned with the advisability of the Court's extending the equal protection clause to encompass these cases and the standards it might use if it chooses to do so.

GERRYMANDERING: IN SEARCH OF A STANDARD

The *Baker* decision removed the issue of apportionment from the category of "political" questions, but it did not challenge the principle that certain categories of cases are nonjusticiable because they involve political questions.[10] It can be argued that gerrymandering, whether applied against a partisan or racial minority, is a political matter. It is political in the popular sense of that word. Traditionally in the legislatures the determination of district boundaries within a county has been the result of bargaining among the partisan, ethnic, and personal interests involved. One of the familiar legislative norms is that a majority party draws the district boundaries in such a way as to help its chances in subsequent elections, although in some states blatant gerrymandering is frowned upon and in others the legislators show more interest in protecting incumbents of both parties than in advancing partisan interests.

A Judicially Discoverable Standard? It can be argued, more forcefully, that gerrymandering meets one of the criteria of a political question specified in *Baker v. Carr*: "a lack of judicially

[8] Baker v. Carr, 369 U.S. 186, 244 (1962).
[9] Gomillion v. Lightfoot, 364 U.S. 339 (1960).
[10] Baker v. Carr, 369 U.S. 186, 208-18 (1962).

discoverable and manageable standards for resolving it."[11] There is an ideal and readily apparent standard for determining the size of districts; it is perfect equality, and it is relatively easy to measure how closely an apportionment approaches it. What is the ideal standard for distributing Republican and Democratic voters among precincts? How many votes of each party should be wasted? There is no standard available in democratic theory or in legislative practice. Moreover, one party may have its strength so concentrated in certain parts of a county that almost any districting pattern will produce lopsided majorities in a few districts. Alternatively, voters belonging to one party may be so thinly and evenly distributed throughout a county that no method of districting could assure them of a single seat in the county. It is not even clear, in some circumstances, whether a given arrangement helps or hurts a party. The gerrymander is a political weapon that often backfires. If the districts are drawn so as to concentrate minority party strength in a minimum number of districts, the minority may waste votes but it is assured a nucleus of legislators able to withstand any political landslide and to develop seniority in the legislature. If the minority party's strength were dispersed by giving it about forty-five per cent of the vote in several districts, a shift in the political tides might give it a majority in all districts. Since a political party in the minority can be handicapped if its strength is either too concentrated or too dispersed, it is extraordinarily difficult to determine what kinds of districts in a given situation discriminate least against the minority.

It would be even more difficult for a court to determine standards for districting that would not discriminate against Negro voters. The heavy concentration of Negro voters in a few sections of most cities makes it difficult to disperse Negro voting strength among a large number of districts. There might very possibly be differences among Negro political leaders concerning the districting tactics that could best serve Negro interests. Should their votes be concentrated in a few districts to assure the election of some Negro legislators or more widely dispersed to give Negro voters an influence over the choice of a larger number of legislators? In any case involving alleged gerrymandering against

[11] *Id.* at 217.

Negroes, the courts lack not only a standard for balancing majority and minority interests, but even a dependable method for determining what districting pattern best serves minority interests.

A Policy Question. The Supreme Court, in the *Baker* case, provided another pertinent criterion of a nonjusticiable political question: "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[12] Some aspects of districting clearly involve policy questions. Should the legislature, as a matter of policy, seek to create districts that are comparatively homogeneous in population characteristics: urban-rural, economic, ethnic? Rational arguments can be presented on either side of this question. In the more homogeneous district the legislator has better opportunities to gauge the viewpoints of constituents, and fewer constituents are unrepresented by a legislator sensitive to their views. Elections are likely to be more one-sided, with the result that a larger proportion of legislators develop seniority and become skilled in their profession. In the less homogeneous district the legislator is less likely to become the spokesman for a few narrow interests. There is likely to be closer competition between the parties and consequently a better chance for the voters to remove a legislator who is not performing satisfactorily. The legislature may not actually weigh these arguments when it draws district boundaries, but the act of districting has these policy implications. If a court sought to review legislation establishing district lines, it would be forced to determine these questions of policy, at least implicitly.

Judicial Views of Partisan Gerrymandering. The Supreme Court has not provided any hint in its apportionment decisions that there might be a judicial remedy for partisan gerrymandering, although it has implicitly criticized gerrymandering in defending the use of political and historical boundaries to avoid it.[13] After the Supreme Court in June of 1964 had determined that the Delaware apportionment was invalid and had remanded the case to the three-judge district court, the legislature of that state adopted a new apportionment law. Plaintiffs asserted that the

[12] *Ibid.*
[13] Reynolds v. Sims, 377 U.S. 533, 578-79 (1964).

new law amounted to a gerrymander against the Republicans. The district court agreed to hear testimony on this question, which it termed "almost completely unexplored," but at this writing it has reached no final decision.[14]

The Legacy of Gomillion. The Supreme Court has twice considered cases involving alleged racial gerrymanders. In the 1960 case of *Gomillion v. Lightfoot* the Court invalidated an Alabama statute that had changed the municipal boundaries of Tuskegee because the clear intent and consequence of the law was "the unequivocal withdrawal of the vote solely from colored citizens."[15] The decision is pertinent because it demonstrates the Court's sensitivity to legislation that discriminates against Negro voters. But the discriminatory effect of the Alabama statute—completely removing Negro voters from the cities—was far greater and more clearly measurable than any districting law that determines what proportion of Negroes will be on either side of a legislative district boundary.

The Supreme Court was confronted with the first allegation of racial gerrymandering among legislative districts in the 1964 case of *Wright v. Rockefeller.*[16] At issue were the boundaries of four congressional districts in New York City, in one of which the Negro and Puerto Rican population constituted a large majority and in three of which they were a small minority. It was claimed that the districts were deliberately drawn to create racially segregated areas and that, as a consequence, the districting law violated the fourteenth and fifteenth amendments. In a seven-two decision, the Supreme Court accepted the findings of the district court majority that there was no proof that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines."[17] The brief majority opinion, written by Justice Black, took note of the fact that the concentration of Negro and Puerto Rican citizens in one district was related to their concentrated residence and was satisfactory to some spokesmen for minority groups (including Congressman Adam Clayton Powell, who was permitted to intervene in the

[14] Roman v. Sincock, 377 U.S. 695 (1964). Sincock v. Roman, 233 F. Supp. 615 (D. Del. 1964)
[15] 364 U.S. 339, 346 (1960).
[16] 376 U.S. 52 (1964).
[17] *Id.* at 56.

case).[18] Although Justice Black's comments suggest that he recognized the difficulty of developing criteria for judging racial gerrymandering, the majority opinion does not deal directly with the critical issues at stake.

The appellants in the case argued primarily that segregation of congressional districts by race violates the fourteenth and fifteenth amendments. Justice Douglas, in a dissenting opinion concurred in by Justice Goldberg, accepted this argument and compared congressional districts to other important *public areas*, such as schools, parks, and courtrooms, where segregation should be prohibited.[19] The comparison is not a helpful one. It is difficult to understand what an electoral district has in common with a public facility. The problems of representation are distinct from the need for maintaining equal and non-segregated public services for persons of all races. The term "segregation" is a misleading and an inappropriate one to be applied to congressional districts.

Judge Moore, in one of the majority opinions of the divided district court, declared that the concentration of a minority racial group in one district was constitutional if there was no underrepresentation of that group, and he noted that such concentration might be desirable because it enabled the racial group "to obtain representation in legislative bodies which otherwise would be denied to them."[20] Justices Douglas and Clark disagreed with this position, and in their separate opinions each declared that, if the districts are segregated, it is "irrelevant" whether the effect is to strengthen or weaken Negro representation.[21] Justice Black, in the majority opinion, completely avoided the question. The consequence is that we do not know whether a majority of the Supreme Court Justices, if they believed that legislative districts weer drawn along racial lines, would consider that the effectiveness of the minority group's votes was a pertinent constitutional issue or, if so, how they would measure this effectiveness. Nor does the *Wright* case provide any clue to the Court's attitude should it be argued that a pattern of districting min-

[18] *Id.* at 57-58.
[19] *Id.* at 62.
[20] Wright v. Rockefeller, 211 F. Supp. 460, 467 (S.D.N.Y. 1962).
[21] Wright v. Rockefeller, 376 U.S. 52, 62, 69 (1964).

imizes Negro voting strength by dissipating it among many districts.

Justice Douglas's dissenting opinion probes the issue more deeply and constitutes a judgment about one of the most fundamental policy questions in a representative system. Douglas criticized the practice of deliberately creating homogeneous legislative districts to assure that ethnic or other minorities have representation; "government has no business designing electoral districts along racial or religious lines." His reasoning is as follows:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.[22]

Though Justice Douglas may be articulating only a single view of the "democratic ideal," his words deserve attention because they represent the first effort by a Justice of the Supreme Court to grapple with the fundamental problem of minority representation in the legislature. If Douglas's viewpoint were accepted by the other Justices, the Court would refuse to invalidate not only a districting law that dispersed Negro voting strength among many districts but also legislation (discussed below) that minimized Negro political strength by creating large multi-member districts. It is also important to note that Douglas's criticism applies explicitly to a districting pattern that protects a racial minority rather than one that benefits a partisan minority.

MULTI-MEMBER DISTRICTS AND MINORITIES

Questions of Policy. The initial question that faces the courts in determining whether multi-member districts infringe on constitutional rights is whether the issue is essentially a political one. We may repeat the questions derived from the *Baker* case: Are there judicially discoverable and manageable standards for deciding the question, and does a decision depend on the reso-

[22] *Id.* at 67.

lution of nonjudicial policy questions? Justice Harlan, dissenting in *Reynolds v. Sims*, has asserted: "No judicially manageable standard can determine whether a State should have single-member districts or multi-member districts or some combination of both."[23] It should be possible, however, unlike the case of gerrymandering, to determine what effect a multi-member district has on minorities in a particular county. A study of voting and population data in a county would make it possible to estimate what proportion of a given number of districts would be likely to contain a majority of Republicans or of Negroes, for example, if a multi-member district were divided into single-member districts. It is obvious, for example, that the larger the number of legislators elected in one multi-member district, the greater the disadvantage (compared to the single-member district plan) for a minority of any given size.

The obstacle to judicial resolution of this issue is not so much the lack of standards as the policy implications inherent in any decision about multi-member or single-member districts. These policy implications are important though they are little understood and there has been little research done concerning the effect of districting patterns on the political and legislative systems.

The use of multi-member districts is often defended as a means of assuring that the legislators will serve county-wide needs and will vote as a bloc in the legislature, instead of representing varied—and possibly conflicting—parochial interests. It might be argued, on the other hand, that a variety of interests in a large metropolitan county deserve representation. In fact, there is no evidence from research on the legislative process to show whether legislators from a multi-member district consistently vote with greater or less unity than those from a comparable county having single-member districts.[24] There are conflicting opinions about the relationship between legislator and constituents. Does a constituent have better access to a single legislator living in his district, or are his opportunities for influence greater when he can choose one of several legislators in a larger district to approach? In a metropolitan county the legis-

[23] 377 U.S. 533, 621 (1964).

[24] See Silva, *Compared Values of the Single- and the Multi-Member Legislative District*, 17 Western Political Quarterly 504-16 (1964).

lator who represents the whole county may be better able to communicate with and be more visible to his constituents through the press and radio than one who is theoretically closer to the voters in a single-member district. We can conjecture about legislative-constituent roles and relationships, but we have no evidence.

There have been studies of the effect of districts on legislative tenure, but they have failed to demonstrate that it has any consistent effect.[25] There is evidence from a few states to suggest that an at-large system increases the number of candidates (per seat) in legislative primaries.[26] In states where candidates in at-large elections must designate a specific "place" or "position" for which they are running, this technique has the effect of channeling most candidates in legislative primaries into races for which there is no incumbent.[27] The encouragement of greater competition or the safeguarding of legislative seniority is a policy choice that the legislature should make, but the effect of particular districting patterns on these matters remains largely obscure. The use of an at-large district in a multi-member county eliminates the necessity of redistricting to accommodate population changes within the county and makes gerrymandering impossible though it may handicap a minority more than gerrymandering would.

Multi-member districts undoubtedly affect the legislative system in a variety of ways, but the only effect that can be clearly established is a decline in the minority party's chances of electing any of its candidates and in a minority group's chances of securing legislators who are particularly sensitive to its interests. In a metropolitan county using single-member districts the minority party will win some seats if its voting strength is sufficiently concentrated and if it is not the victim of gerrymandering. In multi-member districts the minority party rarely elects any legislators because most voters cast a straight-party ballot in legislative races. A partisan division in the district delegation arises only when there is a very close balance in the

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[25] *Ibid.*

[26] Jewell, *Competition and Factionalism in Southern Legislative Primaries and Elections* (Unpublished, presented at the 1962 annual meeting of the American Political Science Association, Washington, D.C.)

[27] *Ibid.*

vote or when a minority party candidate is unusually popular. A study of 84 multi-member House districts in four states (Pennsylvania, Indiana, Michigan, and West Virginia) for periods of three to five elections shows that in less than 5 per cent of the elections was there a partisan division in the district delegation.

The Effect on Minorities. The partisan implications of multi-member districting are significant. In severaal northern states the Democrats have gained an advantage partially offsetting the underrepresentation of metropolitan counties, and in some southern states the use of at-large districts has minimized Republican representation. The effect is most clearly shown when a large metropolitan county constitutes a single house district, as has been true in such states as Indiana, West Virginia, and New Jersey. A single party has sometimes been able to win the eleven seats in Marion county (Indianapolis), the eleven seats in Kanawha county (Charleston), or the nine seats in Essex county (Newark) with margins averaging only a few thousand votes for the winning ticket. In metropolitan counties that are divided into several multi-member districts, the majority party's advantage is reduced. But in Wayne county (Detroit), which until recently was divided into twenty-one districts electing one, two, or three men each, the Democrats have sometimes been able to elect almost an entire slate of legislators. The recent constitutional convention in Michigan, where the Republicans had a large majority, adopted single-member districts for the state. The Michigan legislature also illustrates another possible effect of multi-member districts. In the past the Republican minority has been so underrepresented in metropolitan county delegations that the Republican legislative party has been almost exclusively rural. (The effect of the single-member district system in rural Michigan has been to underrepresent Democrats and make the Democratic legislative party almost completely metropolitan in orientation.)[28]

The effect of multi-member districts on Negro minorities can be most clearly illustrated in the South. Although the Negro vote in much of the rural South remains small, in many of the metropolitan counties it is assuming substantial proportions. In

[28] Lamb, Pierce, and White, Apportionment and Representative Institutions—The Michigan Experience 309-32 (1963).

the near future it is unlikely that a majority of the voters in any southern metropolitan county will be Negro, and it is unlikely that many Negro legislators will be elected in constituencies having a majority of white voters. Negro political influence may be brought to bear on white legislators, but it is unlikely that Negro legislators will be elected except in metropolitan counties that have been divided into single-member or small multi-member districts. Two border states, Oklahoma and Kentucky, use single-member districts (in the case of Kentucky, exclusively). As a consequence Louisville has frequently had a Negro in the legislature. New Orleans has been the only metropolitan county in the South using districts. That county elects one or two house member from each of its seventeen wards. Every other southern metropolitan county having more than one member in either house has elected legislators county-wide. The only exception is in senatorial districts in Georgia, as a consequence of recent judicial intervention described below.

The effects of multi-member districts on both partisan and racial minorities can be illustrated by the 1964 legislative election in Georgia. Fulton county (Atlanta) is divided into seven senatorial districts. Republican senators were elected in two districts by substantial margins, and Negro Democrats were elected in two other districts, one of which had a small margin of white registered voters. The three representatives, elected at large, were all white Democrats who defeated Republican candidates by a margin of about sixty-two per cent.

The issues presented by multi-member districts are questions of policy. The structure of the legislators, the nature of legislative parties, and the struggle of various interests for political power are all affected by the use of multi-member districts. At the same time the use of multi-member districts diminishes the effectiveness of the vote cast by members of a partisan or racial minority. Particularly in a populous county that constitutes one multi-member district, a partisan or racial majority may have a voice in choosing legislators far out of proportion to its numerical strength. The large multi-member district has an effect on minority representation that is far more direct, measurable, and substantial than any effect of gerrymandering.

Judicial Concern with Multi-Member Districts. We can find

recent examples of judicial interest in the question of multi-member districts, but at this writing the courts have provided no answer to the critical question of minority representation.[29] In fact, this question seems to have largely escaped judicial attention. The Supreme Court, in *Reynolds v. Sims*, noted approvingly that flexibility might be achieved and some distinction maintained between upper and lower houses through the use of multi-member districts in some cases.[30] In the Colorado apportionment case the Court described the at-large district for electing eight senators and seventeen representatives in Denver as "undesirable" because ballots were "long and cumbersome," "an intelligent choice among candidates for seats in the legislature was made quite difficult," and voters had no single legislator "elected specifically to represent them." But the Court's remarks were intended to explain the voters' rejection of an apportionment plan based on population, and the Court specified that it was *not* intimating that at-large elections "are constitutionally defective."[31] The Court made no reference in this decision to the possible effects of at-large elections on minority representation. Earlier, in the case of *Westberry v. Sanders* pertaining to congressional elections, the Court said that the principle of "one man, one vote" is "followed automatically, of course, when Representatives are chosen as a group on a statewide basis. . . ."[32]

A three-judge federal district court and the Pennsylvania Supreme Court have both declared invalid an apportionment law enacted in 1964 by the Pennsylvania legislature. The Supreme Court on November 16, 1964, vacated the decision of the district court[33] and remanded the case for further consideration. In effect this action supported the decision of the Pennsylvania Supreme Court to give the legislature until September, 1965, to enact a more equitable apportionment for the 1966 elections.[34] The district court had held that the use of both single-member

[29] There are several recent examples of federal or state courts approving multi-member districts, at least implicity. Moss v. Burkhart 220 F. Supp. 149, 160 (W.D. Okl. 1963), *aff'd sub nom.* William v. Moss, 378 U.S. 558 (1964), Baker v. Carr, 222 F. Supp. 684 (M.D. Tenn. 1963), Davis v. McCarty, 388 P.2d 480, 481 (Okl. 1964).

[30] 377 U.S. 533, 577, 579 (1964).

[31] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 731 (1964).

[32] 376 U.S. 1, 8 (1964).

[33] Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa. 1964).

[34] Butcher v. Bloom, 203 A.2d 556 (1964).

and multi-member districts in the apportionment of one house violates the principle of one man, one vote although there would be no objections if all districts were multi-member and elected the same number.[35] The Pennsylvania Supreme Court had indicated that in certain circumstances the arbitrary creation of both kinds of districts might be constitutionally objectionable although multi-member districts are not inherently unconstitutional. It suggested that the use of single-member districts would be "more prudent."[36] Neither court emphasized the implications of multi-member districts for minority representation.

Plaintiffs in the Pennsylvania case argued in the district court that voters in multi-member districts are discriminated against because they lack an intimate, personal relationship with a single legislator and do not have a clear choice between two men in the election. They also argued that the weight of each vote is diluted in a multi-member district.[37] The judges in the district court agreed that voters in single-member districts derive an advantage from more direct contact with legislators. But they declared that the use of both kinds of districts invalidated the one man, one vote principle because it discriminated against voters in single-member districts. The district court asserted that the voter in a four-man district would have four legislators "who will be especially concerned with his views and interests and amenable to his persuasion," while the voter in a single-member district will have only one representative "to express his views and espouse his interests."[38] The evident confusion about which category of voters has greater access to and influence over legislators suggests that, in the absence of research on the question, it is not a suitable one for judicial determination.

Plaintiffs in the Pennsylvania case raised the question of minority representation in the district court. They asserted that the multi-member district is a technique for submerging the vote of a minority party and that its selective use has a discriminatory effect. They charged that the Republican legislature had used multi-member districts in Republican counties while pro-

[35] Drew v. Scranton, 229 F. Supp. 310, 326-27 (M.D. Pa. 1964).
[36] Butcher v. Bloom, 203 A.2d 556, 572-73 (1964).
[37] Brief for Plaintiffs, pp. 7-11, Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa. 1964).
[38] Drew v. Scranton, 229 F. Supp. 310, 327 (M.D. Pa. 1964).

viding single-member districts in Democratic counties.[39] Attorneys for the state of Pennsylvania did not deny that multi-member districts have these effects. They argued that, while it is "a perfectly legitimate political objective to seek assurance of minority representation," "this is not the political philosophy of the Commonwealth of Pennsylvania" and is not required by the United States Constitution.[40] The district court agreed with the plaintiffs: "Minority groups living in particular localities may well be submerged in elections at large . . .;" it also concluded that the use of single-member districts in some large counties and multi-member districts in others might constitute "gerrymandering for partisan advantage."[41] But the district court appeared to emphasize these factors less in its decision than the discrimination against residents of single-member districts.

A second case concerning multi-member districts arose in Georgia, where the legislature responded to judicial pressure in October, 1962, by reapportioning the Senate and for the first time allotting more than a single senator to each of several counties. The legislature divided each large county into senatorial districts and provided that each senator must be a resident of his district, but it also provided that senators in a multi-member county would be elected by all the voters in the county. Although this differs slightly in its mechanics, the effect is almost the same as a multi-member district in which each candidate runs for a specific place or position. A complicated legal tangle, involving both federal and state courts, ensued. After a state judge interpreted the language of the state constitution to require district elections, the voters in November, 1962, approved a constitutional amendment permitting county-wide voting. In April, 1964, a three-judge federal district court declared that the requirements for at-large elections in multi-member counties was unconstitutional,[42] but on January 18, 1965, the Supreme Court reversed this decision.

The district court ruled that the county-wide elections were unconstitutional because the law was "applied differently to different persons. The voters select their own senator in one class

[39] Brief for Plaintiffs, 9-13.
[40] Brief for Defendants, 39-40.
[41] Drew v. Scranton, 229 F. Supp. 310, 326-27 (M.D. Pa. 1964).
[42] Dorsey v. Fortson, 228 F. Supp. 259 (N.D. Ga. 1964).

of districts. In the other they do not. They must join with others in selecting a group of senators and their own choice of a senator may be nullified by what voters in other districts of the group desire."[43] The Supreme Court decided, however, that in the multi-member counties of Georgia the districts served only as a basis for residence of the candidates and that the legislators were elected by and responsible to all members of the county, as in any other multi-member constituency. The Court reiterated its belief that approximate mathematical equality could be achieved, and in this case was achieved, between voters in single-member and in multi-member districts.[44]

The districting question in Georgia has obvious implications for the representation of racial minorities, a fact that was recognized during legislative debate over districting. In an earlier case at the district court level a brief was filed asserting that a county-wide election would violate the fourteenth and fifteenth amendments because it "results in invidious dilution of a voter's vote due solely to his race." The judges recognized that the brief presented "serious questions," but they made no ruling on the issue. In the more recent *Fortson* case the appellees based their claim on the fourteenth amendment, and made only passing reference in a brief to discrimination against racial and political minorities. As the Supreme Court noted, they "never seriously pressed this point below and offered no proof to support it, the District Court did not consider or rule on its merits, and in oral argument here counsel for appellees stressed that they do no rely on this argument."[45]

The question of minority representation remains an elusive aspect of multi-member districting, but one that has not escaped the attention of the Supreme Court. The most significant part of the Court's opinion might be viewed as an invitation to litigation on this question: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether this system still passes

[43] *Id.* at 263.
[44] 85 Sup. Ct. 498 (1965).
[45] *Id.* at 501.

constitutional muster."[46] The stage appears to have been set for judicial examination of the impact that multi-member districting has on minority voters.

One technique that is available for partisan or racial minorities in multi-member legislative districts (where a "place" system is not used) is the casting of a "single-shot" ballot. By voting for one or perhaps a few candidates, but for fewer than the total seats to be filled, a minority group may be able to elect one or more of its choices. This prospect is enhanced in a primary election if there are a large number of candidates, and it is a technique sometimes used by Negro groups in state or local elections. In South Carolina and Louisiana this tactic is prevented by legislation invalidating the ballot of any person who votes for fewer persons than are to be nominated or elected to an office. The South Carolina law, as it applied to legislative elections in multi-member districts, was challenged in a federal district court. There were only two Republican candidates in Richland county for ten House seats. The petitioners claimed that the law making it impossible for voters to cast votes only for the candidates of their choice—the two Republicans—deprived voters of the liberty of political choice guaranteed by the due process and equal protection clauses of the fourteenth amendment. It was also claimed that the principle of freedom of association under the due process clause was abridged by legislation that discouraged candidacies from minor parties and party voting by members of minority parties. The district court dismissed the complaint for lack of equity, and the Supreme Court refused to review the case.[47] There appears to be no judicial protection for the "single-shot" approach to minority representation, where it is barred by law.

Although there is as yet no certainty that the courts are willing to provide judicial protection for minority representation, there is evidence of judicial willingness to approve legislative enactments that serve that end. A new city charter in New York provided for the election of some councilmen by single-member districts and the election of two councilmen at-large in each of the five boroughs. The voters would be permitted to vote for

[46] *Id.*
[47] Boineau v. Thornton, 85 Sup. Ct. 151 (1964).

only one of the councilmen running at-large in each borough. This plan was designed specifically to insure one minority-party councilman from each borough and to offset in part the lopsided majority enjoyed by the majority Democratic party in New York City. The New York Court of Appeals determined that this system of limited voting violated neither the state constitution nor the fourteenth amendment.[48] The United States Supreme Court dismissed the case for want of a substantial federal question.[49]

[48] Blaikie v. Power, 13 N.Y.2d 134, 193 N.E.2d 55, 243 N.Y.S.2d 185 (1963).

A QUESTION FOR THE COURTS

The absence of standards for defining or measuring partisans or racial gerrymandering should be sufficient reason to remove this issue from judicial purview. Those judges who have reviewed the question of multi-member districts have tried to weigh the effectiveness or power of the votes cast by persons living in single-member and multi-member districts. Lacking firm evidence and operating on the basis of conjecture and vague political theories, the courts have reached conclusions that are contradictory and confusing. At present the courts lack the theoretical and factual foundation for determining whether the combination of both single-member and multi-member districts in a legislative house deprives voters in either type of district of any constitutional rights.

The one aspect of districting that has escaped judicial study is the question of minority representation in a multi-member district, and it is the only question that is ripe for judicial determination. The use of multi-member districts has the clear effect of reducing the likelihood that voters belonging to a minority party or a minority racial group can elect legislators of their choice. The greater the number of legislators elected at large in any district, the more the effective vote of these minorities is decreased. This effect of districting is definable and measurable by the courts. It is true, of course, that the courts cannot determine this question without making policy judgments. But the principle of one man, one vote constitutes a determination of policy concerning the representational system, one that contra-

[49] Blaikie v. Power, 375 U.S. 439 (1964).

dicts the policy of protecting rural minorities implicit in the apportionment systems used by many states in the past. Perhaps the courts should make another policy decision about the representational system, one that is probably less of a departure from theory and practice in the American states. Perhaps the courts should decide that the districting mechanism ought to encourage the representation of those partisan and racial interests that are substantial in size and geographic concentration. In other words, the courts might well consider whether the right to an effective vote is unconstitutionally impaired if a districting system deprives voters who constitute a substantial minority in a county of the chance to elect any legislators of their choice.

Should the courts determine that some minorities have a right to an effective vote, they need not invalidate all multi-member districts. Nor would it be necessary to determine the maximum number of legislators that could be chosen at-large in a district, any more than the Supreme Court has considered it necessary to determine a maximum permissible deviation for equal population of legislative districts. The size and concentration of either partisan or racial minorities would be relevant factors. The homogeneity of a county might be another. (Does it include both suburbs and low-income housing or only one?) The criterion of invidious discrimination might be used to invalidate only those large multi-member districts in which the votes of large minority groups are effectively swallowed up. If the courts invalidated the most blatant examples of districts that devalue the votes of a minority, the legislative majority in other states might be more willing to yield to minority pressures and reform the districts. The courts might well determine that both majority and minority interests might be served by the use of multi-member districts in one legislative house.

The choice of districts is essentially a political question, but, like the question of reapportionment, it is not necessarily one that can be solved in the legislature or at the ballot box. Republican legislators who fall short of a legislative majority because they are unable to elect members in at-large Democratic districts are unlikely to be successful in persuading the Democratic majority to change the law. Negro voters are unlikely to be able, through political means, to force a districting within the

great majority of southern counties where legislators are now chosen at large. The tides of reapportionment are making the problem ever more acute because metropolitan counties are electing an increasing number of legislators. As this trend continues, the problems of representation will increasingly become problems of districting within metropolitan counties rather than apportionment among counties.